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No. 108, Original

IN THE
Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff.

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S MEMORANDUM IN OPPOSITION TO THE MOTION OF PLATTE RIVER TRUST FOR LEAVE TO INTERVENE

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The State of Nebraska opposes the intervention of the Platte River Trust because any possible interest that the Trust might have would be adequately represented by Nebraska and because the Trust's Complaint in Intervention would raise matters that are extraneous to the case.

Representation

In its memorandum in support of its motion to intervene, the Platte River Trust states that it "exists for:"

> [C]arrying out . . . financing programs, activities, and acquisitions to protect and maintain the migratory bird habitat in the so-called Big Bend area of the Platte River between Overton and Chapman, Nebraska . . . .
>
> The programs, activities, and acquisitions . . . shall be formulated to protect and maintain . . . the physical, hydrological, and biological integrity of the Big Bend area so that it may continue to function as a

> life-support system for the whooping crane and other migratory species which utilize it.

Platte River Trust Declaration, Para. II; Memorandum at 4. The language omitted from the Trust Declaration, however, defines the State of Nebraska's relation *parens patriae* to the Trust:

> The purpose of this Trust shall be *to operate exclusively in connection with the carrying out of certain purposes of the State of Nebraska* . . . by financing programs, etc. . . .

Platte River Trust Declaration Para. II (emphasis added). The same language is found in Article III of the Trust's articles of incorporation.

In carrying out certain "purposes of the State of Nebraska," the Platte River Trust is subordinate to the state and is subsumed within the state's exercise of authority *parens patriae*. *Cf., Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601-609 (1982); *Kansas v. Colorado*, 206 U.S. 46 (1907).

With respect to the state's case to enforce the existing apportionment of the waters of the North Platte River and to prevent Wyoming from violating the Court's decree, the Platte River Trust's interests are fully and adequately represented by the State of Nebraska. The Trust, however, wants to go beyond the apportionment. Notwithstanding that the upstream reservoirs in Wyoming and Nebraska are used pursuant to the present decree for irrigation and power purposes, the Trust wants the Court to enter a new decree compelling regulation for a distinctly different purpose, namely to provide certain minimum instream flows between Overton and Grand Island, Nebraska, some 120 miles downstream from the Wyoming Nebraska stateline.[1]

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[1] Nebraska law provides the appropriate legal mechanism for obtaining a right to a minimum instream flow. Neb. Stats. Sections 46-2,108 through 46-2,119. The proper forum is an administrative proceeding before the Director of Water Resources.

Extraneous Issues

Aside from its representation problem, the Platte River Trust seeks to raise issues in this case that are beyond the scope of the Court's apportionment decree. In its statement of the case, the Trust asserts that "[t]his is an action to enforce and modify the equitable apportionment of the waters of the North Platte River . . . ." Memorandum at 1. There is nothing in Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief, however, which seeks to "modify" the 1945 and 1953 decrees.[2]

This case was tried as an equitable apportionment of the North Platte River among the states of Nebraska, Wyoming, and Colorado. From Nebraska's perspective the apportionment was effectuated by placing certain restrictions on the diversion of water from the North Platte and its tributaries in Wyoming and by awarding 75% of the natural flow of the river between Whalen and Tri-State Dam to Nebraska.

In contrast to the case as litigated and decided, the Platte River Trust seeks to litigate post-decree developments and "[c]hanged conditions manifested by recent federal statutes and better scientific knowledge about the environmental effects of water allocations . . . ." Complaint in Intervention at 7. The Trust also ignores the essence of the suit, *i.e.*, the division of water at the stateline, and seeks intrastate relief in the form of minimum instream flows in Nebraska.

Given the issues sought to be litigated and the relief sought by the Trust, it is clear that the Trust does not seek to intervene in the ordinary sense of the word, but to try a new and different case. The Trust should not be allowed to enlarge the issues or alter the nature of the proceedings. *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944) ("[O]ne of the most usual procedural

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[2] While Nebraska does not seek to modify the decrees, that is not to say that clarification of the decrees may not be necessary to protect the apportionment. Nebraska does intend to seek whatever clarification that is needed, including the express articulation of tacit elements of the decrees.

rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding.") While the Federal Rules of Civil Procedure are no more than a guide to procedures in an original action [*Utah v. United States*, 394 U.S. 89 (1969)], it is fundamental that an intervenor is limited to the issues tried by the original parties. *Columbia Gas & E. Co. v. American Fuel & Power Co.*, 322 U.S. 379 (1944).

CONCLUSION

Although the Platte River Trust's interests are fully and adequately represented by the State of Nebraska and the request for intervention should be denied, Nebraska does not oppose the Trust's participation in the conventional role of an *amicus curiae*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify that three true and correct copies of Nebraska's Memorandum in Opposition to the Motion of Platte River Trust for Leave to Intervene were served on each of the following parties required to be served, in accordance with U.S. Supreme Court Rule 9.3, by depositing the same in the United States mail with first-class postage prepaid and addressed on this 3rd day of April, 1987 to:

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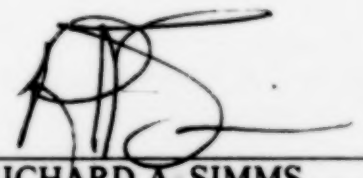
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